IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 492

CIVIL AERONAUTICS BOARD,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

No. 493

LAKE CENTRAL AIRLINES, INC.,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR DELTA AIR LINES, INC.

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BRIEF FOR DELTA AIR LINES, INC.

Delta Air Lines, Inc. (hereinafter "Delta"), the Petitioner below, prays that this Court will affirm the decision of the United States Court of Appeals for the Second Circuit in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 280 F. 2d 43 (2d Cir. 1960) (R. 98-107).

COUNTERSTATEMENT OF QUESTION

Whether the Civil Aeronautics Board (hereinafter the "CAB"), after it has deliberately made a certificate of public convenience and necessity effective under Section 401(f)[1] of the Federal Aviation Act,[2] wherein it is provided that a certificate shall be effective "from the date specified therein and shall continue in effect until suspended or revoked as" thereafter in the statute provided, still has power to alter such a certificate by acting on timely petitions for reconsideration of the underlying agency decision but without resort to the procedures specifically provided in the statute for certificate modification.[3]

COUNTERSTATEMENT OF THE CASE

Contrary to the implication contained at page 5 of the CAB's Brief, the agency proceeding here involved did not concern only "the long-haul service needs" of the Great Lakes-Florida area. There was no limitation placed upon the trial of Delta's application, or upon that of any other trunkline applicant, which in any way limited the applicants' rights to seek both long-haul authority and also

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[1] 72 Stat. 754, 49 U.S.C. 1371(f).

[2] 72 Stat. 731, 49 U.S.C. 1301. Between issuance of the CAB's September 30, 1958, decision, and the attempted modification of Delta's certificate on "reconsideration," the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401) was replaced by the Federal Aviation Act of 1958. The provisions of the former Act here involved were reenacted without change, and there admittedly is no issue stemming from the supplantation of the former Act.

[3] In essence, the Question as stated above is the same as that set forth in the CAB's Brief (No. 492). It is different, however, than that set forth in the Brief of Lake Central Airlines, Inc., in No. 493, because the latter involves an allegation that the CAB had "expressly reserved" the right to make the certificate modification of which complaint here is made. As hereinafter will be shown, however, there was no express reservation of right, and no such allegation was contained in the Question presented to this Court in Lake Central's Petition for Certiorari.

authority to provide short-haul types of service between intermediate cities in the area (the latter being the type of authority which, as deliberately granted to Delta, forms the basis of the present controversy). See CAB Order E-9734, R. 2 *et seq.*

In its decision of September 30, 1958 (CAB Order E-13024, R. 11 *et seq.*), the CAB added a number of cities to Delta's Route 54, one of which was Indianapolis, Indiana. Prior to that time, Route 54 had run in a southeasterly direction from Chicago to Miami via certain intermediate points not including Indianapolis. Indianapolis, however, was already served by Delta on another route (Route 8) which ran in a southwesterly direction from Detroit to New Orleans via intermediate points, including Evansville, Ind., as well as Indianapolis. The addition of Indianapolis to Route 54 permitted Delta for the first time to offer service between that city and other nearby points already served by Route 54 (*e.g.*, Cincinnati).[4] Since Indianapolis already was an intermediate point on the Detroit-New Orleans Route 8, inclusion of that city as an intermediate point on Route 54 had the additional effect, which the CAB specifically recognized and approved (R. 19 and 38) of joining the two routes together at Indianapolis, thereby permitting Delta to serve cities on both of these routes on the same flight, provided that the flight stopped at the "route junction point" of Indianapolis.[5]

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[4] This was also true of the addition of two other cities to Route 54, Dayton and Louisville. The addition of the latter two cities, plus Indianapolis, permitted Delta to serve 10 markets formed by those three cities, on the one hand, and nearby, already-certificated points, on the other hand. All 10 of these markets are involved in the present controversy, the Indianapolis markets cited in the text being used only as illustrative examples.

[5] Unless the CAB imposes "restrictions," a carrier may operate flights between any combination of authorized points on a given linear route. Similarly, absent restrictions, when two routes of a carrier have a common point, the carrier may operate flights between any combination of points on the two routes via the common point.

For example, after inclusion of Indianapolis on Route 54, Delta could operate from Chicago to Indianapolis over that route, and thence on the same flight from Indianapolis to Evansville over existing Route 8.

As the Brief (p. 5) of Lake Central Airlines, Inc. in No. 493 (hereinafter "Lake Central") notes, the agency imposed restrictions on a number of new certifications granted to *other* applicants in order to protect existing local service carrier operations. Contrary to the statement at page 6 of the CAB Brief, however (where the agency implies that "such restrictions" were imposed with respect to some of Delta's new intermediate points), *none* of these restrictions were imposed upon the certifications made to Delta.[6] Indeed, no restrictions of any kind were imposed upon Delta's new Louisville and Indianapolis authorities.

The new Delta certificate was to become effective sixty days after issuance (*i.e.*, on November 29, 1958), with the proviso that *prior* thereto the CAB might extend that effective date upon its own initiative or in recognition of a timely-filed petition for reconsideration of the September 30th order (R. 56). As CAB and Lake Central have stated, petitions for reconsideration were in fact filed by various parties including Lake Central and Piedmont Aviation, Inc. (hereinafter "Piedmont"), both local service carrier intervenors in the agency proceeding. These two petitions sought, *inter alia*, to have restrictions imposed upon Delta's authority between ten pairs of cities which Delta had been certificated to serve without restriction by the September 30th decision.[7]

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[6] The few restrictions which were imposed upon Delta's new authority (R. 46-47), were all imposed for other reasons.

[7] It might be noted that Piedmont, which is affected equally as much as Lake Central by the Decision below, did not attempt to intervene in the Court proceeding.

Lake Central's petition to the CAB for reconsideration also requested a stay of the effective date of Delta's certificate if necessary to permit CAB action on the petition to be taken before the certificate went into effect (R. 92). On November 28, 1958, the CAB issued its Order E-13211 (R. 57 *et seq.*) which, with one exception, refused to stay the effective date of any new certificate and therefore specifically denied Lake Central's plea (R. 58 and 80).

The CAB assigned two interrelated reasons for its refusal to grant the requested stays. First, after reviewing the various petitions for reconsideration "for the purposes of assessing the probability of error in [the CAB's] original decision" (R. 58 and 79-80), the agency found that they did not make a sufficient showing of probable legal error or abuse of discretion to justify a stay, except for the one exception referred to above (R. 58-59). Second, the CAB stated that it wished to have the new services involving Florida inaugurated in time for the peak period of winter travel during the 1958-1959 season (*ibid.*). As Petitioners' Briefs note, the CAB's opinion closed with the statement that Order E-13211 was not a disposition of the several petitions for reconsideration on their merits, which disposition would be made at a later time (R. 79-80; also see R-58).

The one exception where a stay was granted involved new authority which had been awarded to Eastern Air Lines, Inc. Piedmont, in its petition for reconsideration, sought revisions of an extension which had been made of Eastern's Route 6 from Charleston, W. Va., to Chicago. In its opinion accompanying Order E-13211, the CAB found that Piedmont's objections to this Eastern authorization *did* raise serious questions (no such finding was made with respect to the petitions directed to the Delta certificate); and it was for that reason that the Eastern certificate's effective date was stayed until further action could be taken by the CAB (R. 78). At the same time,

while it stayed the entirety of Eastern's Charleston-Chicago certification, the CAB invited Eastern to show how the certificate might be stayed only in part to protect Piedmont during the reconsideration process, while being allowed to go into effect in other respects (R. 78-79).

For reasons not here relevant, by supplementary CAB order Delta's new certificate actually was made effective on December 5, 1958, rather than November 29, 1958 (see R. 94 and 95). On January 1, 1959, pursuant to schedules filed with the CAB—to which schedules no party, including the CAB and Lake Central, lodged any objection—Delta inaugurated various services under the new certificate, including flights between Chicago and Indianapolis which continued beyond Indianapolis southward to Evansville over Delta's long-established Route 8. Shortly thereafter, Delta also inaugurated service between Louisville and Indianapolis. In both instances, the services inaugurated would not have been permitted had the Board imposed the type of restrictions which Lake Central and Piedmont had requested during the course of the administrative proceeding.

On May 7, 1959, over five months after Delta's new, unrestricted authority became fully effective, and four months after Delta had inaugurated new services pursuant to the schedules filed with the CAB, the agency issued the order of which complaint was made in the Court below (E-13835, R. 81 *et seq.*). This order purported to constitute the CAB's formal disposition of the various petitions for reconsideration of the September 30, 1958 decision which the CAB by its own choice had left pending when it deliberately made the certificate effective. The order did in fact undertake to modify the former decision, by imposing upon Delta the restrictions which Lake Central and Piedmont had requested, but which had been omitted from the certificate as originally issued, so that a Delta flight serving any one of the ten pairs of cities

mentioned in those carriers' petitions would thereafter be required to originate at Atlanta or a point on Route 54 south thereof (R. 83-84). Although the CAB indicated that it could review the matter of Delta's restrictions in a then-pending *Great Lakes Local Service Investigation*, CAB Docket 4251 *et al.* (R. 83-84), that *Investigation* has now been completed and no further action has been taken on the Delta restrictions.

One effect of the restrictions was to render illegal the services which Delta already had inaugurated in good faith, and had been operating for some four months, between Evansville and Chicago via Indianapolis, and for a shorter period between Indianapolis and Louisville. The former of these two services was the very type of interroute operation which the CAB, in its original decision, had noted could be provided by Delta by virtue of the inclusion of Indianapolis on Route 54 in addition to its already-existing status as a point on Delta's Route 8 (R. 19 and 38). And as the Court below found, "it is affirmatively clear that when the Board refused on November 28, 1958 to stay the effective date of Delta's certificate, it was fully aware of the arguments which subsequently led it on May 7, 1959, to impose the restrictions here complained of" (R. 104).

Upon Petition by Delta, the Court below stayed the effectiveness of Order E-13835 and, in its later decision (R. 98 *et seq.*), held that the CAB was without power to impose the additional restrictions upon Delta's certificate by means of "reconsideration" after the certificate had become effective. The decision was based upon the limitations imposed by Congress upon the CAB in Sections 401(f)[8] and 401(g)[9] of the Federal Aviation Act.

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[8] 72 Stat. 754, 49 U.S.C. 1371(f).

[9] 72 Stat. 754, 49 U.S.C. 1371(g).

SUMMARY OF ARGUMENT

In Section 401(f) of the Federal Aviation Act, Congress has declared with preciseness that an air carrier certificate of public convenience and necessity "shall be effective from the date specified therein," and shall "continue in effect until suspended or revoked" as thereafter provided in the statute. Section 401(g) of the Act is the only provision (other than sections providing for judicial review) which deals with modification of effective certificates. Section 401(g) sets forth definite procedures by way of notice and hearing and clear standards which must be employed before such modifications can be accomplished.

All parties agree that Delta's certificate here became effective before the CAB attempted to modify it, and all parties agree that the prescribed Section 401(g) procedures were not followed by the agency in attempting the modification. It also is admitted that there was no fraud, no misrepresentation, and no clerical or other inadvertent error in the original issuance of Delta's certificate or in the agency's action, many months before the attempted modification, in making that certificate effective under Section 401(f). Nor was there any express reservation in the CAB's orders or in Delta's certificate of a right to reconsider the certificate later.

Indeed, it is affirmatively clear that when the CAB refused to stay the effective date of Delta's certificate just prior to that effective date, the agency was fully aware of the arguments which subsequently led it to attempt the imposition of the restrictions. It was as fully aware of those arguments as it was of the arguments which *did* prompt it to stay the effective date of an Eastern Air Lines certification on the ground that the petitions for reconsideration had shown good reason for revision of the Eastern award. The subsequent imposition of restrictions

on Delta, therefore, was attempted merely because of a post-decisional change of policy by the agency.

The CAB contends for purposes of this case that there is an "implicit" exception to the requirements of Section 401(f) which allows modification of a certificate without adherence to Section 401(g) procedures where, on the effective date of a certificate, the agency of its own choice has not acted upon pending petitions for reconsideration but nevertheless has proceeded to make the certificate fully effective. But there is nothing in the statute or in its legislative history to support such an implicit exception. Indeed, contrary to most federal statutes creating regulatory agencies, the Federal Aviation Act does not specifically confer on the agency any right to reconsider even its "orders." While the agency undoubtedly does have the right to provide by rule-making for reconsideration of "orders," prior decisions of this Court establish that the agency cannot circumvent the clear statutory requirements by also providing for reconsideration of fully effective "certificates," because to do so would derogate from and conflict with explicit statutory provisions to the contrary. Approval of such a procedure would render the carefully designed statutory scheme a shambles, and would destroy the route security supposed to be provided by certificates—the very keystone of the Federal Aviation Act.

The decision below accords fully with a long line of judicial and administrative precedent, and there is no conflict between the decision below and that of any other Circuit on the substantive issue—the only issue here involved—of the proper effect of Sections 401(f) and 401(g) of the Act. The decision under review is entirely in line with decisions by this Court holding that under a statutory framework such as that prescribed in the Federal Aviation Act, effective certificates of public convenience and necessity can be modified only in the manner spe-

cifically authorized by Congress. Indeed, the decision below is in line with a large number of previous opinions by the CAB itself, issued over an extended period of years, wherein the agency as a matter of consistent practice has recognized its lack of power to reconsider effective certificates. Moreover, since its attempt in this case (on May 7, 1959) to "reconsider" Delta's effective certificate, the agency has returned to its former practice. The agency's action here under review constitutes an arbitrary departure from its own past (and present) policy for the mere purpose of attempting to enforce a post-decisional change of policy in this particular case.

The decision below will not impede the administrative process, or even render difficult the agency's reconsideration of route case decisions. Prior to the decision below, the CAB itself has recognized that the "implicit" exception to Section 401(f) for which it now contends does not exist, yet the agency has had no difficulty in adopting procedures which have allowed it full freedom to reconsider its decisions. In fact, the CAB has at least four courses of action open to it, each one of which is in full accord with the law as laid down by Congress, each one of which allows the agency complete freedom of action, and no one of which is foreclosed by the decision here under review. On the other hand, approval of the position urged by Petitioners would destroy a carefully-designed statutory scheme which now affords full protection to both public and private interests, and would render implementation of new route certifications an exceedingly precarious undertaking.

ARGUMENT

Both the CAB and Lake Central contend that the decision below gives an unduly restrictive interpretation to Sections 401(f) and 401(g) of the Federal Aviation Act, which is not required (a) by the language of the statute

or (b) by the relevant case law. In addition, the CAB argues that the decision below will hamper its administrative processes. Delta will show that none of these three arguments contains any substance.

I. The Decision Below Properly Construed and Applied the Language of the Federal Aviation Act.

When reduced to its essence, the decision below is merely this: Because the CAB is a creature of Congress, its "powers are purely statutory," *Seatrain Lines, Inc.* v. *United States*,[10] and it therefore can act only ". . . as specifically authorized by Congress," *United States* v. *Seatrain Lines*.[11] As the Court below recognized (R. 103), the *Seatrain* case involved a situation analogous to the one involved here. The decision below, therefore, merely applied well-settled law to the clear and unambiguous language of Sections 401(f) and 401(g) of the Federal Aviation Act. It rejects, as did *Seatrain*, an agency attempt to read into its organic statute a power which Congress chose not to grant—a power which, however, would create an implied exception to a clear limitation which Congress *did* impose.

The Congressionally imposed limitation is upon the CAB's power to modify certificates once they have been made effective, and is contained in the following portion of Section 401(f):

> "Each certificate shall be effective *from the date specified therein*, and *shall continue in effect* until suspended or revoked as *hereinafter* provided . . ." (Emphasis added.)

And as the Court below held (R. 103), the next succeeding section, Section 401(g), is the *only* provision in the

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[10] 64 F. Supp. 156, 160 (D.C. Del. 1946), *aff'd.*, *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947).

[11] 329 U.S. 424, *supra*, at 433.

Act which expressly deals with agency modification of certificates.[12] Section 401(g), which prescribes specific procedures for effecting such modification, admittedly was not followed here.

The Petitioners argue that Sections 401(f) and 401(g) must be read as "contemplating" or "implicitly assuming" (CAB Brief, pp. 9 and 14-15) an exception[13] which would allow modification of an effective certificate without adherence to Section 401(g) procedures in those instances where, on the date specified by the CAB in a certificate for its effectiveness under Section 401(f), the agency through its own choice leaves pending a previously filed petition for reconsideration of the underlying agency decision.[14]

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[12] Section 1006(d) of the Act, of course, 72 Stat. 795, 49 U.S.C. 1486(d), provides for judicial review of CAB decisions, including those granting certificates. See pages 15-16 of this Brief, *infra*.

[13] Although Section 401(f) does state three express exceptions to its rule of certificate inviolability, none of them is applicable here: (1) a certificate conferring temporary authority ceases to be effective upon expiration of its term (Delta's certificate here was permanent); (2) a certificate will cease to be effective if the CAB certifies that operations under it have ceased (there has been no such certification here); and (3) if a carrier fails to inaugurate service authorized by a certificate within 90 days of authorization, the CAB upon notice and hearing may revoke the unused authority (here Delta did inaugurate service under its new certificate within 90 days and, of course, there has been no notice or hearing of any kind).

[14] The CAB contends that this "implied" exception must be read into the statute because otherwise its reconsideration of CAB route decisions will be rendered difficult (CAB Brief, pp. 10-11). As will be seen below, however (this Brief, pp. 37-43), prior to this case the CAB itself has recognized that the exception for which it contends does not exist, yet the agency has had no difficulty adopting procedures which have allowed it full freedom of action to reconsider its decisions. The decision below leaves all of these procedures open to the agency, and strikes down only the unauthorized procedure sought to be utilized in this particular case.

Neither the CAB nor Lake Central is able to point to any specific language in Section 401(f), Section 401(g), or elsewhere in the statute or in its legislative history, which explicitly or implicitly grants to the agency such a power to alter the words of Congress for purposes of a particular case merely by withholding its decision on a petition for reconsideration. To the contrary, the language of the statute is clear and unambiguous:

> ". . . It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that, result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation . . .
>
> ". . . where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. . . ." (*United States* v. *Missouri Pac. R.R.*, 278 U.S. 269, 277-278, 1929).

Not only can Petitioners cite no support for the "implicit" exception for which they contend, but the Petitioners are unable to point to any specific language in the statute which grants the CAB power to reconsider certificates under any circumstance. The CAB, in fact, admits that ". . . the Federal Aviation Act, *unlike* various other federal statutes establishing regulatory commissions, does *not* expressly provide for reconsideration" even of CAB "orders" (CAB Brief, p. 13, emphasis added.) It therefore relies upon the proposition that the "power to reconsider is inherent in the power to decide," and argues that Sections 204(a), 1001, and 1005(d) of the Act, 49 U.S.C. 1324(a), 1481, and 1485(d), "create" such a power (*ibid.*). Delta does not challenge the CAB's power to adopt procedural regulations setting up a reconsideration

procedure. But Delta does emphasize that procedural rules adopted under these *general* sections of the statute (quoted in the margin),[15] which deal only with "amending," "modifying," or "suspending" CAB "*orders*," cannot be used to modify the *specific* language of Sections 401(f) and 401(g). The latter two sections prescribe when a *certificate* shall become effective and carefully outline the procedure thereafter to be followed in the event that it is desired to consider possible revision of a *certificate*.

In the *Seatrain* case, *supra*, the Interstate Commerce Commission relied upon language in the Water Carrier Act which was substantially identical with Sections 204 (a), 1001, and 1005(d) of the Federal Aviation Act, in attempting to create a power which Congress had not specifically granted to modify certificates. This Court rejected the argument, and held (329 U.S. at 432):

> "Nor do we think that the Commission's ruling was justified by the language of Sec. 315(c), 49 USCA Sec. 915(c), 10A FCA title 49, Sec. 915(c), which authorizes it to 'suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.' *That the word 'order', as here used, was intended to describe something different from the word 'certificate' used in other places, is clearly shown by the way both these words are used*

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[15] Section 204(a) merely empowers the CAB "to perform such acts, to issue and amend such *orders*, and to make and amend such general or special rules, regulations, and procedure, pursuant to and *consistent with the provisions of this Act*, as it shall deem necessary *to carry out the provisions of, and to exercise and perform its powers and duties under, this Act*" (emphasis added). Section 1001 authorizes the CAB, but only "subject to the provisions of this Act and the Administrative Procedure Act," to conduct its proceedings "in such manner as will be conducive to the proper dispatch of business and to the ends of justice." Section 1005(d) only provides that "*except as otherwise provided in this Act*, . . . the Board is empowered to suspend or modify [its] *orders* upon such notice and in such manner as [it] shall deem proper" (Emphasis added).

> *in the Act.* Section 309 describes the certificate, the method of obtaining it, and its scope and effect, but it nowhere refers to the word 'order.' Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word 'certificate.' . . . It is clear that the 'orders' referred to in 315(c) are formal commands of the Commission relating to its procedure and the rates, fares, practices, and like things coming within its authority. *But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding . . .*" (Emphasis added).

The CAB seeks to support its argument for an "implicit" exception by noting that a certificate would be terminated, "without going through the procedures specified in Section 401(g)," if the Board order making the award were set aside upon judicial review. "The situation," the CAB argues, "is essentially the same with respect to reconsideration pursuant to valid Board rule" (CAB Brief, p. 15). The CAB clearly is wrong. Sections 401(f) and 401(g) are not limitations upon the power of courts to review CAB decisions. The courts specifically are empowered by Congress to set aside agency action which is improperly taken, provided only that a petition for review is timely filed (Section 1006 of the Federal Aviation Act, 72 Stat. 795, amended by 74 Stat. 255, 49 U.S.C. 1486). If, upon review, agency action granting new certificates is found to be improper, the certificates involved become ineffective from the outset and therefore naturally fall "without going through the procedures specified in Sections 401(g)."

Sections 401(f) and 401(g), on the other hand, were written into the statute as specific limitations upon the *agency's* power. Furthermore, the Court is not here faced with a situation where original CAB action is alleged to

have been taken improperly. To the contrary, both the original grant of new authority to Delta (CAB Order E-13024, R. 11 *et seq.*), and the agency's action in putting that authority into effect (CAB Orders E-13211 and E-13245, R. 57 and 95), were deliberate acts which in no manner contravened the law. The Court rather is faced with an arbitrary administrative change of policy made *after* the certificate was granted and *after* the certificate was made effective and had been implemented (". . . it is affirmatively clear that when the Board refused on November 28, 1958 to stay the effective date of Delta's certificate it was fully aware of the arguments which subsequently led it on May 7, 1959 to impose the restrictions here complained of" (R. 104)).[16] Clearly, the CAB can draw no comfort from the power specifically granted to the Courts to review CAB action.

The Petitioners attempt another argument. They try to convey the impression that Delta's certificate, although made effective, was "expressly conditioned" upon the outcome of the pending petitions for reconsideration (CAB Brief, p. 16).[17] There was no contention made to the

[16] And it also is clear that there was no fraud, no misrepresentation, and no clerical or other inadvertent error, involved in the issuance and effectuation of Delta's certificate. See R. 104.

[17] Petitioner Lake Central attempts to go one step further and, in framing the Question Presented (Lake Central Brief, p. 2), says that the Board's order (refusing to stay the effective date of Delta's certificate), "expressly reserved the right to make such modification." The Court will notice, however, that *no such contention concerning a reservation of power was made by Lake Central in its Petition for Certiorari* (see Lake Central Petition for Certiorari, Question Presented, p. 2). The *CAB's* Petition for Certiorari, in presenting the question which the agency desired this Court to review, did make mention of such a "reservation of power," but the CAB seems now (on brief) to have dropped this contention. No contention was made in this proceeding by either the Petitioner in No. 492 or in No. 493 prior to the now-abandoned statement in the CAB's Petition to this Court, that the agency actually had attempted to "reserve" the power

Court below, however, that any such "express condition" was imposed in order to provide for subsequent "reconsideration" of Delta's final and effective certificate, and this Court will search the certificate (R. 54-56), the original granting order (E-13024, R. 11-53), the order refusing to stay the certificate's original effective date (E-13211, R. 57-80), and the order putting the certificate into effect (E-13245, R. 95) in vain for any such "express condition." Petitioners apparently rely upon the following statement in the Decision below (R. 106):

> ". . . Furthermore, we have accepted, *arguendo*, the Board's argument that the language in the order quoted in footnote 4, *supra*, put Delta on notice that the Board purported to reserve to itself power to modify the certificate on the basis of matters set forth in the filed petitions for reconsideration."

The language just quoted merely explains that this particular CAB argument was not considered sufficient to alter the decision below; it does nothing but recite the CAB's argument, and clearly does not constitute recognition that any actual "condition" or "reservation of power" to reconsider existed. The CAB's language to which the Court referred was set forth in the explanatory (the "Opinion") portion, as distinguished from the "Ordering" portion, of the CAB's decision refusing to stay the effective date of Delta's certificate, and was as follows: "Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions on their merits" (R. 80 and 101). Even assuming, *arguendo*, that this language did constitute notice of some kind to Delta, *the mere fact that the CAB "served notice" that*

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to reconsider Delta's final and effective certificate. And it is clear that neither Delta's certificate (R. 54-56), the "ordering" clauses of the CAB order granting that certificate (R. 49-53), or of the order refusing to stay the effective date of the certificate (R. 80) or of the order finally making that certificate effective (R. 95) contained any attempt to reserve such power.

it intended to act in violation of the statutory scheme did not give it power to do so and certainly was not an order expressly attempting a formal reservation.

Moreover, as the counterstatement shows, just a few days before the effective date of the Delta and the other new certificates, the CAB denied all requests [18] for postponement of that date except in the case of a certificate which had been granted to Eastern Air Lines (R. 58-59 and 79-80). In so doing, the CAB stated that it had reviewed the petitions for reconsideration (in support of which the requests for postponement were made), "for the purposes of assessing the probability of error in our original decision" (R. 58 and 79-80), and had found that except in the Eastern Air Lines situation, they did *not* make ". . . a sufficient showing of probable legal error or abuse of discretion" to justify the requests for stay of effective dates (R. 58). The import, of course, upon which Delta acted in implementing its new authority, was that the petitions for a reconsideration would not be granted except in the case of those complaining of Eastern's new authority.[19] In the latter case, where the CAB did conclude that the petitions raised serious questions, it did extend the beginning date of Eastern's certificate so as to permit effective reconsideration (R. 58 and 77-79). Obviously, therefore, Delta did not proceed to operate under its new authority "with full notice" (CAB Brief, p. 25) nor was Delta "unmistakably aware" (CAB Brief, p. 26) that the CAB might "reconsider" the authority as the CAB now contends to this Court. To the contrary, Delta was led to believe that its certificate would *not* subse-

[18] Including one which Lake Central had made with specific reference to Delta's certificate.

[19] It might here be noted again that while the CAB stayed the entirety of the Eastern certificate involved, it invited Eastern to show the agency how the certificate might be stayed only in part, thereby both protecting the objecting party and allowing other parts of the award to go into effect (R. 78-79).

quently be altered. And, beyond peradventure of a doubt, the CAB made no express reservation of power and did not impose any express condition, providing for subsequent modification by "reconsideration."

Even if the CAB had made an actual reservation of power in Delta's certificate, the decision below would remain correct. The CAB cannot by a voluntary *ex parte* action, create powers for itself which Congress has withheld; it cannot, by a "reservation" or a "condition" empower itself to ignore the clear requirements of Section 401(f) and 401(g). In *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951), this Court sanctioned use of an express reservation which had been written into a Motor Carrier certificate. The original reservation there involved provided that the ICC might impose other terms to make the carrier's motor carrier operations auxiliary to the railroad operations conducted by its parent company. The new restrictions, in other words, were specific restrictions imposed within the scope of the original restriction. The Court noted that actual changes or revocations may be made in motor carrier certificates *only* under Section 212(a) of the Motor Carrier Act, 49 U.S.C. 312(a) (340 U.S. 419 at 426), the section which is substantially similar to, and upon which were patterned, Sections 401(f) and 401(g) of the Federal Aviation Act (R. 103). (Sec. 212(a) of the Motor Carrier Act is set out in Appendix A hereto.) In passing upon the Commission's action, the Court stated, therefore, that even:

> ". . . Such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will. That would violate Sec. 212, allowing suspension, change or revocation only for the certificate holder's willful failure to comply with the Act or lawful orders or regulations of the Commission . . ." (340 U.S. 419 at 435).

It is clear from the foregoing that neither the CAB nor Lake Central has pointed to anything in the Act or in its legislative history, or in the facts of this case,[20] which countermands the clear and explicit requirements of Sections 401(f) and 401(g). Nevertheless, the CAB flatly

[20] Lake Central says that if the Court below is sustained, the carrier "will be compelled" to institute a new proceeding before the CAB, incur the expense of building another record which may in part duplicate the one in this case, and in the meantime be subject to diversion "of its local traffic" between Chicago and Indianapolis and between Indianapolis and Cincinnati (Lake Central Brief, p. 9). None of these contentions prove anything, of course, and certainly have no bearing on the correct interpretation of the Congressional mandate in Sections 401(f) and 401(g). But they *are* misleading. Lake Central speaks as if it held effective Chicago-Indianapolis authority before Delta's new certificate was granted. In point of fact, the best authority which the carrier had between Chicago and Indianapolis was the right to render a one-stop service (after meeting certain other requirements) while at least two other carriers held nonstop authority. As a result, Lake Central never was an effective participant in the traffic. For example, in March of 1958, the last period officially surveyed by the CAB before Delta's certificate was granted, Lake Central carried only 24 passengers in both directions between Indianapolis and Chicago in a 14-day period, out of a total of 3,994 passengers—or approximately six-tenths of one percent of the total traffic movement. Even a total loss of this volume of revenue—approximately $20.00 of gross revenue per day—obviously would be *de minimus*. Its current participation is about the same. Prior to Delta's certification, Lake Central had certificate authority in the Indianapolis-Cincinnati market only because two different Lake Central route segments, one of which included Indianapolis and the other Cincinnati, happened to have a common junction point through which Lake Central could operate indirect services between the two points. Its nonstop service in the market was by virtue of an exemption order only, not certificate authority. And here it carries only about one-ninth of the traffic. Finally, in a memorandum in opposition to Delta's petition to the Court below for stay, the CAB itself said of Lake Central, "while the carrier contended that the mentioned restrictions [on Delta] should be imposed for the additional purpose of protecting it against competitive impact in relation to its existing multi-stop services, the Board made no express finding of necessity for a restriction for such purpose" (CAB Objections to Stay, p. 6, ftn. 9, referring to Order E-13835, pp. 3-4, R. 83).

contends that "a Board order remains subject to modification or recission in response to a timely petition for reconsideration, without regard to whether the Board has authorized the commencement of operations" (CAB Brief, p. 12). This proposition, if taken at face value, would leave the agency free to sit on a petition for reconsideration for as long as it pleased while the recipient of new air route authority invested the large amounts of money and time which are required to put such authority into effect; thereafter, the agency could withdraw the authority completely.

In apparent recognition that this proposition is extreme, the CAB seeks to mitigate its statement. "This is not to say," it admits at page 15 of its Brief, "that the Board has unlimited powers to keep a proceeding alive through the exercise of its rule-making authority, or that Section 401(f) of the Act is without function beyond specifying the date on which a certificate first becomes effective. Obviously," it continues, "the Board has a duty to dispose of petitions for reconsideration within a reasonable time." But the Court will note that the agency points to nothing which would require such action "within a reasonable time," and to nothing defining what, in the agency's opinion, such "a reasonable time" would be.

In short, the construction of the Act contended for by Petitioners, and despite the CAB's protestations as to what it thinks its duty is, would give the CAB unfettered power to hold back its action on petitions for reconsideration as long as it desired, while in the meantime urging the carriers to incur the expense of starting service under the new certificates.[21] Approval of such a position would

[21] The unambiguous language of Section 401(f)—properly applied by the Court below as written by Congress—gives a carrier to whom new route authority has been granted a clear-cut date (the "date specified" in the new certificate) beyond which the heavy capital expenditures of equipping and operating a new air route may safely be made. In contrast, the CAB's argument,

render the carefully designed statutory scheme enacted by Congress a shambles. The whole policy of the Act, against which the CAB's position militates, is one of controlled competition, giving protection and security both to air travelers and to the carriers. In order to promote both interests, a most elaborate and intricate regulation of the air transport industry was established, whereby the CAB was granted far-reaching powers in nearly all important areas where regulation was feasible. The certificate of public convenience and necessity is the keystone of this entire structure.

According to the author of the Civil Aeronautics Act in the House of Representatives, the certificate is intended as an inducement for achieving "security of route . . . and protection against cut-throat competition," *Lea*, 83 Cong. Rec. 6407 (1938). At the same time, in view of the broad powers given to the CAB, a certificate grant to an air carrier constitutes a measure of protection against extreme variations in government policy.

The security thus afforded is the inducement—often the only inducement—for a carrier to invest substantial sums and otherwise commit itself to render service which the public requires, especially service which the CAB has urged be inaugurated at an early date following certificate effectiveness. In view of the contractual nature of these certificates and the important public purposes to be accomplished, it is only natural that Congress imparted firm security by providing that the privileges and obligations of certification should commence at a specific time (on the certificate's effective date [illegible]ction 401[f]); by prescribing, with equal certainty, definite procedures and clear

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based on action within "a reasonable time," would leave the carrier-recipient of new authority in the untenable position of either proceeding at its peril or of bringing judicial action for mandamus to compel action by the CAB on the pending petitions for reconsideration.

standards for the modification or revocation of effective certificates (Section 401[g]); and, in order to protect the certificate holder against improvident amendment or termination of its authority, by withholding power from the CAB otherwise to alter a carrier's certificate after the agency has put certificate rights and obligations into full effect.

The decision of the Court below merely applies and gives full effect to these precisely delineated elements of the statutory scheme. The Petitioner's arguments, with no statutory or legislative history citations,[22] amount to nothing but an attempt to justify an administrative agency's action in deliberately attempting for purposes of

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[22] At page 17 of its Brief, the CAB cites *Denver-Chicago Trucking Co. Common Carrier Application*, 27 M.C.C. 343 (1940), wherein the ICC is said to have modified an effective certificate without adhering to the provisions of Section 212(a) of the Motor Carrier Act, upon which Sections 401(f) and 401(g) of the Federal Aviation Act are based. The Motor Carrier Act, however, unlike the Federal Aviation Act, does contain specific provisions regarding reconsideration—Sec. 205(h), 49 Stat. 548, 49 U.S.C. 305(h), incorporating Sec. 17(6) of the Interstate Commerce Act, 24 Stat. 385, 49 U.S.C. 17(6). But more important, *Denver-Chicago* was decided before *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465 (1942), wherein the Commission recognized that once it makes a certificate effective, its power with respect to the certificate is expressly marked off and limited by Section 212(a) of that Act, and also before *United States* v. *Seatrain Lines, supra*, wherein this Court cited *Smith Bros.* with approval and held that a certificate may be modified only as specifically authorized by Congress.

At page 16 of its Brief, the CAB also says that "one must give weight to the presumption that Congress was fully aware of the normal incidents of the administrative process, including the precept that the power to decide includes the power to reconsider," when it enacted the Federal Aviation Act and its predecessor, the Civil Aeronautics Act. But Congress must be presumed equally to have been aware of the fact that in other regulatory statutes it had specifically granted agencies a right to reconsider; yet in the Civil Aeronautics and Federal Aviation Acts no such specific right was granted.

this particular case to circumvent limitations carefully imposed upon it by Congress.

II. The Decision Below Does Not Conflict With Prior Decisions Of This Court Or Of Other Circuits Or Of Administrative Agencies.

Petitioners also contend that the decision below conflicts with other court and administrative decisions. They place their heaviest reliance upon the language italicized in the following quotation from this Court's opinion in the *Seatrain* case, *supra*, 329 U.S. at 432-433 (CAB Brief, pp. 9 and 18; Lake Central Brief, p. 13):

> ". . . The certificate, when finally granted *and the time fixed for rehearing it has passed*, is not subject to revocation in whole or in part except as specifically authorized by Congress . . ." (Emphasis added).

The italicized language, however, is not applicable to a proceeding under the Federal Aviation Act.

The quoted language from *Seatrain* was concerned with a certificate issued under the Water Carrier Act.[23] Contrary to the Federal Aviation Act, the Water Carrier Act does not specify the date upon which a certificate shall become effective, nor does it lay down a procedure for modifying a certificate once issued (see *United States* v. *Seatrain Lines, Inc., supra*, 329 U.S. at 430). Moreover—again contrary to the Federal Aviation Act—the Water Carrier Act *does* contain elaborate provisions with respect to rehearing, reargument, and reconsideration of agency decisions, orders and requirements.[24] These two factors account for the Court's reference to the passing of the "time fixed for rehearing," and serve to distinguish that

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[23] 54 Stat. 929 *et seq.*, 49 U.S.C. 901 *et seq.*

[24] Section 316(a) of that Act, 54 Stat. 946, 49 U.S.C. 916(a), incorporating Section 17(6) of the Interstate Commerce Act, 24 Stat. 385, 49 U.S.C. 17(6).

particular portion of the *Seatrain* decision from the case now before the Court.

The Petitioners also allege a conflict between the decision below and *Frontier Airlines, Inc.* v. *Civil Aeronautics Board,* 259 F. 2d 808 (D.C. Cir. 1958) (CAB Brief, p. 18; Lake Central Brief, p. 10). Citing *Frontier* as the only case in which the precise question here involved has been raised, the CAB alleges that the District of Columbia Circuit "rejected" the position taken by the Court below in this case. It is true that *Frontier* involved a somewhat similar question to that here presented, among many unrelated questions. But that case did *not* involve the precise issue raised here concerning *diminution* of the complainant's effective authority on reconsideration. Equally important, the court in *Frontier* did not purport to rule upon any related issue. In this respect, *Frontier* merely decided a question as to the CAB's power to act upon petitions for reconsideration—and even then only with the court's approval—after a petition for *judicial review* had been filed.

Another case cited by the CAB is *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 194 F. 2d 211 (9th Cir. 1952) (CAB Brief, p. 18). But as the Court below held (R. 105, ftn. 11), the *Western* case "involved a Board procedure entirely different from that in the present case." [25]

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[25] In *Western,* subsequent to the effective date of an order *approving the transfer* of a certificate, the CAB imposed *labor protective* conditions. These conditions were not imposed upon a certificate, and did not affect the route authority to be held by the transferee (11 C.A.B. 701, at 713). Moreover, the CAB's power relative to the transfer of certificates is governed by Section 401(h) of the Federal Aviation Act, 72 Stat. 754, 49 U.S.C. 1371 (h), rather than Sections 401(f) and 401(g). It might also be noted that under Part II of the Interstate Commerce Act, this Court has stated that the Commission's power to amend an order approving the transfer of a certificate is more flexible than its power to amend a certificate, *United States* v. *Rock Island Transit*

Both Petitioners cite *Outland* v. *Civil Aeronautics Board*, 284 F. 2d 224 (D.C. Cir. 1960). They rely on language in that decision to the effect that where a petition for rehearing is in fact filed, "there is no final action until the rehearing is denied" (CAB Brief, p. 19; Lake Central Brief, p. 11). This language, the Petitioners assert, indicates that the CAB's jurisdiction to modify or amend a certificate is retained until the agency has finally acted on petitions for reconsideration.

The Petitioners overstate the effect of *Outland*. The decision below was concerned with the particular, substantive limitations which Congress, in Sections 401(f) and 401(g), has imposed upon the CAB's power to withdraw certificate authority after the certificate has been made effective. *Outland*, on the other hand, did not involve a certificate, and thus in no manner involved construction or application of the substantive provisions of the statute with respect to the effectiveness and inviolability of certificates. *Outland* (insofar as here pertinent) was concerned only with the effect upon the time for judicial re-

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Co., supra, 340 U.S. at 445-446. In addition, the *Western* case involved misrepresentation in testimony before the CAB by the acquiring carrier's chief executive officer. Both the agency (11 C.A.B. 701 at 708), and the Court (194 F. 2d at 214) indicated that absent these unusual circumstances, the imposition even of labor protective conditions after a *transfer's* effective date might *not* be approved. And there is language in *Smith Bros., Revocation of Certificate, supra*, indicating that if a certificate has been obtained as a result of misrepresentation it may be revoked without a formal proceeding under Section 212(a) of the Motor Carrier Act, the section upon which Sections 401(f) and 401(g) of the Federal Aviation Act were patterned. The *Smith Bros.* case has been cited with approval in a number of judicial decisions, for example, in *Seatrain Lines, Inc.* v. *United States, supra*, 64 F. Supp. at 160; *United States* v. *Seatrain Lines, Inc., supra*, 329 U.S. at 430-431; and *United States* v. *Rock Island Transit Co., supra*, 340 U.S. at 447-448. Indeed, Delta concedes, *arguendo*, that where fraud, misrepresentation or inadvertent error is involved (*which is not this case*) the CAB does have power aside from Section 401(g) to alter the original certificate.

view where a petition for rehearing is filed with the CAB under the agency's procedural rules concerning rehearing and reconsideration.[26] In that case, the District of Columbia Circuit merely restated its long-standing view concerning that procedural question and decided the case on

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[26] The CAB (Brief, p. 20, ftn. 15) contends that *Outland*, together with the decision below, may have "created" a procedural problem with respect to judicial review of CAB orders in route cases. Its reasoning is that if the effectiveness of a certificate controls the agency's power to act on a petition for reconsideration directed to that certificate, a party wishing to seek judicial review may have to file a "protective petition" with the Court if, as the certificate's effective date approaches, the agency has not yet acted on that party's petition for reconsideration. We fail to see any real problem. In the first place, the CAB normally provides a period of 60 days between its decision and the date on which a new certificate will become effective (see Delta's certificate here, R. 56). This is done for the specific purpose of leaving the CAB time to act on petitions for reconsideration before a new certificate becomes effective (see pages 29-34 of this Brief, *infra*). Accordingly, the CAB usually will have disposed of petitions for reconsideration before a new certificate becomes effective. And the CAB has power, of course, to further extend a certificate's effective date if it cannot act on petitions for reconsideration within the normal 60-day period. Moreover, where a particularly large record and complex issues are involved, the CAB can give itself more than 60 days for completion of the reconsideration process—see *Southern Transcontinental Service Case*, where a 90-day "grace period" recently was written into new certificates, CAB order E-16500, dated March 13, 1961, and not yet reported. In the second place, *Outland* does not foreclose a party from foregoing a petition to the CAB for reconsideration, and immediately appealing from the original agency order if it desires (284 F. 2d at 227). Furthermore, the decision in *Outland* did not "create" any problem of "protective petitions" because such problem has existed for years, and continues to exist; compare the *Outland* decision with the ruling of the Ninth Circuit in *Consolidated Flower Shipments* v. *Civil Aeronautics Board*, 205 F. 2d 449 (9th Cir. 1953). And, finally, to the extent that the decision below may have intensified the problem, the result flows only from the Court's correct application of the Congressional mandate in Sections 401(f) and 401(g), a matter which the agency should take up with Congress, not this Court (*Cf. Delta Air Lines, Inc.* v. *Summerfield*, 347 U.S. 74, 79-80 (1954), discussed at pages 37-38 of this Brief, *infra*).

the merits on an issue totally different than the substantive question involved here.[27] Thus, neither *Outland* nor the decision below deals with the substantive or the procedural matters involved in the other case.

The CAB also cites a number of cases on page 20 of its Brief decided under the Communications Act.[28] These cases are likewise irrelevant here. The Communications Act contains no provision like Section 401(f) of the Federal Aviation Act, creating a definite vesting date for certificate rights and giving them continuous effect unless altered under specific statutory procedures. Broadcasting licenses cannot even be granted for more than 3-5 years.[29] Air carrier certificates have an entirely different purpose than Communications Act permits; see *F.C.C.* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940); Ryan, *Revocation of an Airline Certificate,* 15 Journal of Air Law and Commerce, 377 (1948).[30] Moreover, unlike the Federal Aviation Act, the Communications Act (in Section 405)[31] does provide for rehearing.

Under these circumstances, decisions dealing with FCC decisions are not precedent for Federal Aviation Act cases. For example, *Black River Valley Broadcasts* v. *McNinch,* 101 F. 2d 235 (D.C. Cir. 1938), cited by the CAB

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[27] Similarly, *Waterman Steamship Corp.* v. *Civil Aeronautics Board,* 159 F. 2d 828 (5th Cir. 1947), *rev'd on other grds.*, 333 U.S. 103, and *Braniff Airways* v. *Civil Aeronautics Board,* 147 F. 2d 152 (D.C. Cir. 1945), both cited by the CAB at page 19 of its Brief, were concerned only with the timeliness of a petition for review, with no agency reconsideration of an effective certificate being involved in either case.

[28] 48 Stat. 1064, 47 U.S.C. 151 *et seq.*

[29] Communications Act, Sec. 307(d), 48 Stat. 1083(d), 47 U.S.C. 307(d).

[30] The author is a former Chairman of the Civil Aeronautics Board.

[31] 48 Stat. 1095. 47 U.S.C. 405.

at page 20 of its Brief, turned upon a petition for rehearing under Section 405 of the Communications Act. The Court said:

> ". . . There can be no doubt that Watertown was exercising a procedural right *specifically provided for by Congress.* The filing of the petition for rehearing, of course, stayed the proceedings and reopened the case. . . ." (101 F. 2d at 239-240, emphasis added).

No such finding could be made under the Federal Aviation Act.[32]

Finally, both Petitioners point to five cases wherein the CAB supposedly has modified, upon reconsideration, certificates which it previously had made effective (CAB Brief, p. 18, ftn. 14; Lake Central Brief, p. 7, ftn. 12). Only four of the cited cases actually involved certificate modifications,[33] and in none of them did the affected carrier thereafter raise any objection. The four uncontested cases constitute only scattered exceptions to a *consistent* and *contrary* course of action by the CAB ever since 1948 —a course of conduct which clearly has constituted agency recognition of its lack of power to reconsider an effective certificate. In its *Kansas City-Memphis-Florida Case,* 9 C.A.B. 401 (1948), the CAB said:

> ". . . We have grave doubt, however, as to our possession of such power . . ." (9 C.A.B. 401 at 408-409).

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[32] It might also be noted that under the CAB's rule governing reconsideration, the filing of such a petition does *not* serve to stay the proceeding or to reopen the record as is true under the Communications Act, *CAB Rules of Practice in Economic Proceedings,* CAB Rule 37, 14 C.F.R. 302.37 (1960 Supp.).

[33] The fifth case, *United-Western Acquisition of Air Carrier Property,* 11 C.A.B. 701 (1950) involved a certificate transfer only, and is discussed *supra,* pp. 25-26 of this Brief, under the title *Western Airlines, Inc.* v. *Civil Aeronautics Board,* 194 F. 2d 211 (9th Cir. 1952).

In view of this doubt, the agency went on to announce that:

> ". . . in future cases of this kind, except where national security or other urgent considerations dictate otherwise, we shall pursue a policy of making the certificate effective on such date as will permit reconsideration without creating the legal problem raised in the present case" (*ibid.*).

Since rendering this decision, the CAB consistently has made new certificates effective sufficiently long after the decision date, usually sixty days (as in this case—R. 56), to permit reconsideration if requested, and has conditioned even such an advance effective date upon a power reserved unto itself to extend the date further if necessary to allow additional study of petitions for reconsideration.[34] Moreover, in cases decided before this one, the CAB repeatedly has used this power to postpone the effective date of certificates during reconsideration.[35]

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[34] To cite but a few typical and varied instances where the Board has reserved this power, see *Chicago Helicopter Service Case*, 9 C.A.B. 687, 694 (1948); *TWA, Removal of Santa Fe-Albuquerque Restriction*, 16 C.A.B. 265, 272 (1952); *Indiana-Ohio Local Service Case*, 16 C.A.B. 880, 942-943, 944 (1953); *Frontier, Route No. 93 Renewal Case*, 16 C.A.B. 948, 958 (1953); *Southern Certificate Renewal Case*, 17 C.A.B. 116, 123 (1953); *Service to Fargo, N. Dak. Case*, 17 C.A.B. 580, 615 (1953); *Texas Local Service Case*, 18 C.A.B. 34, 55 (1953); *Bonanza Renewal Case*, 19 C.A.B. 779, 799 (1955); *Service to Ely, Nevada Case*, 20 C.A.B. 402, 407 (1955); and Order E-13024 *in this very case*, R. 56.

[35] *E.g.* see the successive postponements in *Additional California-Nevada Service Case*, 11 C.A.B. 39, 51 (1949), 11 C.A.B. 1081 (1950) (Order further extending effective date as "required by the public interest to maintain the *status quo* for a sufficient period of time to permit the Board to consider adequately the contentions" made in petitions for reconsideration), 11 C.A.B. 1082 (1950) (Order further extending effective date for the same reason); *New York-Florida Case*, 24 C.A.B. 94, 136 and 143 (1956), granting Delta and National Airlines, Inc., certificates to be effective November 27, 1956, and Order E-10785, dated No-

In recently amending its procedural rule with respect to reconsideration of orders so as to reduce the time for filing such petitions from 30 to 20 days following a CAB decision, the agency noted:

> "*It is the Board's normal practice in route proceedings to make certificate awards effective 60 days after issuance of the final opinion and order.* Thus, under present filing procedures [because 10 days were allowed for answers to petitions], there normally remains only a 20-day period between the completion of filings and *the date upon which the certificate becomes effective.*
>
> "It has become increasingly evident, particularly with the growing size and complexity of the Board's route proceedings, that a period of 20 days is wholly inadequate and imposes an undue burden upon the Board and its staff when some *action by the Board is necessary or desirable before new or amended certificates take effect . . .*" (PR-34, adopted by the CAB on February 11, 1959, 24 F.R. 1152, emphasis added).

Moreover, as the Court below found (R. 105), the CAB even has represented to at least one court that it has been the agency's practice heretofore to allow a "grace period" between certificate issuance and its effectiveness, and to stay a certificate's effective date if necessary in order to give the agency time to consider the merits of petitions for reconsideration, *Southwest Airways* v. *Civil Aeronautics Board*, 196 F. 2d 937, 938 (9th Cir. 1952). In its Brief to the Ninth Circuit in that case (pp. 14-15 thereof), the CAB told the Court:

> ". . . These clauses providing for a future effective date for the certificate were inserted therein for the stated purpose of giving the parties to the proceeding an opportunity to file petitions for reconsideration of the Board's supplemental decision and *to insure*

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vember 26, 1956 and not reported, staying said effective date "pending disposition of the petitions for reconsideration in this proceeding"; and Order E-13211 in this case, R. 58, 78, and 80.

time for the Board to act thereon prior to the effective date of the certificate . . .

". . . *The language therein* [in what is now Section 401(f) of the Federal Aviation Act] *requiring that a certificate 'shall continue in effect until suspended or revoked as hereinafter provided' comes into play* only *'from the date specified' for effectiveness in the certificate . . .*" (Emphasis added).

Accordingly, in its opinion, the Ninth Circuit stated:

"Southwest also argues that the recission of a *still ineffective* certificate must be done in accordance with the revocation provisions of 49 U.S.C.A. Sec. 481(h) [now Sec. 401(g) of the Federal Aviation Act]. We do not agree. The certificate was by its terms in a state of suspension totally dependent on the Board's order which had sired it. *The Board points to its administrative practice of postponing certificates of this character so that time may be allowed for petition for reconsideration of the parent orders.* See Kansas City-Memphis-Florida case, 9 C.A.B. 401 (1948). The Board certainly has the power to reconsider its orders and set them aside, 49 U.S.C.A. Sec. 645(a) and (d), and if certificates *not yet effective* are dependent on those orders, they will also be extinguished. *The situation is totally different from that in which a certificate has become effective*" (196 F. 2d 937, at 938; emphasis added).

Furthermore, just recently the CAB has issued two orders in which the agency again has recognized that unless it stays the effective date of certificates until it can dispose of petitions for reconsideration, it will lose the power to do so. The first order was issued in the CAB's *Great Lakes Local Service Investigation,* CAB Docket 4251. Except for the actual ordering language staying the effectiveness of the new certificates there involved, that order in its entirety reads as follows:

"Various petitions for reconsideration of the Board's decision in the above-entitled proceeding (Order E-15695, dated August 25, 1960) have been filed and it appears that the Board's consideration of these peti-

tions will not be completed until after November 8, 1960, the date presently fixed for making effective the amended certificates issued as part of the Board's decision herein. *In order to preserve the status quo until the Board has had adequate opportunity to dispose of the aforementioned petitions, we find that it is in the public interest to stay the effectiveness of the certificates in question*" (Order E-15995, November 4, 1960, not yet reported, emphasis added).

Thereafter, the CAB amended this order on behalf of one of the carriers involved but, in doing so, again recognized that where reconsideration is likely it must stay the affected certificates:

> "After considering the matters presented by North Central in the light of the record in this proceeding, the Board has determined that any further postponement of the effective date of North Central's amended certificate, insofar as it relates to the newly awarded routes in Michigan, is unnecessary and would not be in the public interest. *On the other hand, since various petitions for reconsideration of the award of the Detroit-Cleveland route segment to North Central are now pending before the Board, the Board concludes that the stay of North Central's amended certificate insofar as it authorizes service over this segment should continue in effect until disposition of the petitions relating to this issue.*
>
> "It further appears that the Board will be unable to dispose of the petitions for reconsideration in this proceeding prior to December 1, 1960, the date upon which the stay provided in the aforementioned order E-15995 is due to expire. *In these circumstances, we will also extend this stay* insofar as it is applicable to the certificates of Lake Central, Allegheny and Piedmont, *until disposition of the petitions in question*." (CAB Order E-16071, November 25, 1960, not yet reported; emphasis added).[36]

[36] It might also be noted that in the first paragraph of the above quotation, the CAB undertook to stay only a portion of the awards made to North Central Airlines, Inc., while leaving other portions to go into effect.

Another order similar to E-15995 (first quoted above) also recently was issued in the CAB's Docket 10161, *Mohawk Temporary Points Case,* Order E-16326, dated February 1, 1961, and not yet reported.

It is clear from the foregoing that neither the CAB nor Lake Central has established any inconsistency between the decision below and other decisions by the courts or by administrative agencies, including the CAB itself. On the other hand, it is manifest that the decision under review does fully accord with prior case law. As already seen, the decision is in accord with *United States* v. *Seatrain Lines, Inc., supra,* wherein this Court, like the Court below, held that certificates can be modified only in the manner specifically authorized by Congress.

The *Seatrain Case* was not the first time, nor the last, that in analogous situations it has been decreed that an agency must follow procedures specifically prescribed by Congress, and not attempt by inference to create for itself other powers not expressly conferred. Thus, in *Seatrain,* this Court cited an earlier decision by the Interstate Commerce Commission under the language of Section 212(a) of the Motor Carrier Act (Appendix A hereto), which Section is substantially similar in content to Section 401 (f) and 401(g) of the Federal Aviation Act. As this Court put it:

> ". . . in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in Section 212(a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. *Re Smith Bros. Revocation of Order,* 33 M.C.C. (F) 465" (329 U.S. 429, at 430-431).

As the Interstate Commerce Commission had put it in the *Smith Bros.* case itself:

". . . We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefore appears and until all controversy is determined, but *once a certificate, duly and regularly issued, becomes effective our authority to terminate it is expressly marked off and limited.* All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated but *the certificate marks the end of the proceeding,* just as the entry of a final judgment or decree marks the end of a court proceeding . . ." (Emphasis added).

In exact accord, see *Hergott* v. *Nebraska State Ry. Commission,* 15 N.W. 2d 418 (Neb. 1944). For a state case involving the same factual situation presented here, and reaching the same conclusion as the court below, see *Smith* v. *Wald Transfer & Storage Co., Inc.,* 975 S.W. 2d 991 (Texas 1936).

One of the more important decisions decided since the *Seatrain* case is *United States* v. *Watson Bros. Transportation Company,* 350 U.S. 927 (1956), affirming 132 F. Supp. 905. A three-judge District Court in that case ruled, under those provisions of the Motor Carrier Act which are similar to Sections 401(f) and 401(g) of the Federal Aviation Act, that:

". . . The only statutory authority for the suspension, change, or revocation of such a certificate by the Commission is contained in Section 212(a) . . .

". . . Since the latter order was issued without notice and hearing and for reasons other than those stated in Section 212(a), it is invalid.

". . . the order . . . is an attempt made contrary to Sec. 212 to revoke and change a certificate duly issued" (132 F. Supp. 905 at 909).

In the *Watson* case there was a deliberate attempt by the Interstate Commerce Commission to implement a change of heart through modification, without notice and hearing, of a previously-effective certificate.

Except for the fact that no petition for reconsideration had been filed (the Commission acted upon its own motion) the *Watson Case* is on all fours with the present one. As the Court below found (R. 104), in this case there is no suggestion of inadvertent error, no suggestion that at the time it was put into effect Delta's certificate mistakenly contained greater authority than the Board intended to confer by its earlier decision granting the certificate. And, as noted earlier, the Court further found it to be "affirmatively clear" that when the CAB refused, just prior to the certificate's effective date, to extend that date as Lake Central had requested in order to permit reconsideration, the CAB was fully aware of the arguments which subsequently led it on May 7, 1959 (five months after the certificate became effective and four months after Delta had inaugurated service under that certificate) to impose the restrictions of which Delta complains.

The fact is, therefore, that in the interim the CAB changed its policy, an arbitrary—or at least unilateral—administrative determination which did not and cannot invest the agency with authority to modify an effective certificate without adherence to Sections 401(f) and 401(g) procedures, *United States* v. *Watson Bros. Transportation Company, Inc., supra; American Trucking Association, Inc. et al.* v. *Frisco Transportation Company,* 358 U.S. 133, 156 (1958). Clearly, the CAB's actions were all taken deliberately and, like the Interstate Commerce Commission action involved in *Watson,* constitute an invalid attempt, contrary to specific statutory limitations, to change a certificate duly issued.

The foregoing [37] makes it clear that the decision below

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[37] The CAB, in footnote 17 on page 21 of its Brief, also cites *Fuller-Toponce Truck Co.* v. *Public Service Commission,* 96 P. 2d 722, 724-725 (Utah 1939) and *Hazard-Hayden Bus Co.* v. *Black,* 293 Ky. 379 (Ct. App.), 169 S.W. 2d 21 (1943). The cases are not in point. The first did not involve any issue as to an

is not in conflict with the cases relied upon by Petitioners but, to the contrary, is fully consistent with a long line of court and administrative agency cases.

III. The Decision Below In No Manner Will Impair The Administrative Process

The CAB's charge that the decision below will impair its administrative responsibilities is not an argument properly directed to this Court.

As long as the decision comports with the statute and with the decided case law, as it does, any policy problems thereby created for the Board are for Congress to resolve. This Court heretofore has rejected a CAB argument that it should be allowed to depart from its governing statute for reasons of policy, *Delta Air Lines, Inc.* v. *Summerfield, supra.* The Court told the CAB that there, as here, it had misconceived its remedies:

> "*The Board makes an extended argument of policy* against that position in elaboration of the reasons it advanced for not offsetting the excess earnings from domestic operations against the international subsidy rate. . . . It maintains that maximum operating efficiency on the part of air carriers and the development of air transportation—prominent objectives of the Act . . .—will be better served by setting subsidy rates on a divisional rather than on a system basis. *This may be so. But that is a matter of policy for Congress to decide . . .*" (347 U.S. at 79-80; emphasis added).

So it is here. Congress has prescribed a definite procedure for changing an effective certificate, whether the

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agency's power to reconsider (the Utah Commission was clearly granted such right by statute, in contrast to the lack of such grant in the Federal Aviation Act) and in the second case, there never was a validly-issued certificate. The second case deals only with a motion to reopen in a situation where the movant had alleged that it had been denied a fair hearing.

change is to be revocation or modification (see R. 104). It did so because either type of change could seriously affect valuable operating and property rights.

Not only are the Board's policy appeals thus irrelevant, but in various respects they are incorrect. The Board complains, for example, that a consequence of the decision below may be "unduly hasty decisions on requests for reconsideration raising complex problems" (CAB Brief, p. 11).

As mentioned herein earlier, however, the CAB invariably makes new certificates effective at least 60 days after the date of the granting decision, in order to allow sufficient time for reconsideration (see, for example, R. 56). The CAB requires petitions for such reconsideration to be filed within 20 days after the decision, and answers thereto 10 days later, leaving the CAB 30 days during which to act upon those petitions without worrying about the original effective date.[38]

If a proceeding should be so complex as to indicate that the resulting thirty days will be insufficient, the CAB can always write a longer grace period than sixty days into a new certificate when it is granted. As seen above, the agency recently has done this in another case.[39] If this is not done, and the thirty-day period actually proves to be inadequate in any particular case, all the CAB has to

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[38] CAB Rule 37(a), 14 C.F.R. 302.37(a) (1960 Supp.). At the time the agency case here involved was decided, 30 days were allowed for filing petitions for reconsideration. 14 C.F.R. 302.37 (a) (1956 Rev. ed.). Thereafter, Rule 37 was amended (PR-34, adopted by the CAB on February 11, 1959—24 F.R. 1152) so as to reduce the time for filing to 20 days, in order to give the CAB and its staff more time ". . . when some action by the Board is necessary or desirable before any new or amended certificates take effect" (*ibid.*). See page 31 of this Brief, *supra*.

[39] *Southern Transcontinental Service Case*, CAB Docket 7984, *et al.*, Order *E-16500*, *supra*, where 90 days were provided.

do is extend the effective date of new certificates until it finishes its job of reconsideration. Indeed, in this very case, in the same order in which it refused to stay the effective date of Delta's certificate, the CAB *did* extend the effective date of a new certificate granted to another carrier because in that one instance it found that a petition for reconsideration had raised a point sufficiently valid to perhaps require revision of the certificate (Order E-13211, R. 58 and 77-79).[40] No such finding was made in the case of Delta's certificates.

Clearly, "hasty reconsideration" need not result from the decision below. A former Chairman of the CAB, writing with respect to the agency's *Kansas City-Memphis* case, *supra* (pp. 29-30), decided in 1948, has pointed out that the view of the law applied by the Court below "does not mean frustration of the Board's ability to reconsider its decisions in certificate cases," Ryan, *Revocation of an Airline Certificate, supra,* 15 Journal of Air Law and Commerce at 389.

The CAB also complains that further stay of a certificate's effective date in some cases might disable the agency from immediately putting needed services into effect while petitions for reconsideration are pending (Brief, pp. 11 and 22).[41] In this connection it must be noted that the agency can stay only a portion of a new

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[40] Also see CAB Order E-16071, quoted *supra* p. 33 of this Brief, and Footnote 35, *supra.*

[41] This argument is a strange one in the context of this case. The administrative proceeding here involved commenced on May 25, 1955, when it was noticed for prehearing conference. The CAB took three years and four months to reach a decision (on September 30, 1958, R. 11). Even then, without a further short delay if necessary for completion of the reconsideration process, certificates were not to be effective until November 29, 1958 (R. 56).

award if it desires to give protracted reconsideration to petitions seeking reconsideration of that portion, while allowing other portions to go into effect. The CAB says (Brief, p. 23) that such a procedure is impractical. But as shown previously in this Brief, the agency has done so on a number of occasions—see CAB Order E-16071, quoted at page 33, *supra*, and the agency's invitation to Eastern Air Lines, Inc. in this very case, Order E-13211, R. 78-79).[42]

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[42] The CAB makes one other curious argument on this general subject. At page 10 of its Brief, it says, "we stress that Delta resisted a stay of the effective date of the certificate *so that it might earn revenues* during the pendency of the applications for reconsideration . . ." (Emphasis added). The Court will understand that there is absolutely nothing in the record of this appeal, or in the record before the agency, which will support the underscored portion (or, indeed, any portion) of this CAB statement.

This is the first time that any such argument has been presented in any portion of this case. Such an inflammatory remark is highly prejudicial, implying some lack of integrity in Delta's representations to the Federal Courts and to the agency.

The fact is that except in the limited instance noted below, Delta neither sought a stay of the effective date of new certificates granted to any party in the agency proceeding, nor did Delta at the administrative level oppose the requests of others for stay. The only point at which Delta resisted a stay of Delta's certificate was during the course of a separate court proceeding in the Second Circuit which Eastern Air Lines had initiated (*Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 271 F. 2d 752 [2d Cir. 1959]). (In connection with this resistance, Delta sought from the CAB a stay of Eastern's certificate to be co-extensive with any stay of Delta's certificate issued by the agency for the convenience of the Court. This request became moot when Eastern's certificate was extended for other reasons—R. 78). And even then, Delta's objections to a Court stay were not in any manner based upon the theory that the *CAB* would still have power to act on a petition for reconsideration after Delta's certificate became effective, but rather upon the straightforward argument that—as later events proved true—Eastern had no likelihood of success on the merits of its appeal, and had not shown that it would be irreparably injured if a stay did not issue or that the public would not be so injured if a stay did issue.

Moreover, the Court must fully appreciate the import of this last CAB argument. If, despite the CAB's past contrary policy and despite Delta's inauguration of service under its new authority before the agency attempted to impose the restrictions here in question, those restrictions nevertheless can be imposed under a theory which has as a premise the desirability of commencing new service while petitions for reconsideration are pending, then the CAB can in any case issue a certificate no matter how extensive, indicate that service thereunder should commence as soon as possible, but then sit on pending petitions as long as it desires and, whenever the whim strikes it, disrupt all that has been done in reliance on its previous action. As the Texas Court said in *Smith* v. *Wald Transfer, supra,* in such an event:

> "... There would be no way of knowing with reasonable certainty when the commission's jurisdiction had terminated and its orders had effectively become final. This is fairly illustrated in the instant case. The certificate was granted March 29, 1934. No official action was taken by the commission until October 30, 1934, and it did not pass upon the matter until December 17, 1934. During all of this time appellee was operating under the order with the knowledge and at least tacit consent of the commission. To give validity to the December order would in effect render this operation illegal retroactively. ..." (97 S.W. 2d at 991).

The foregoing is not merely a hypothetical strawman. In this very case, in addition to granting Delta new authority in the markets here in question, the CAB made a number of substantial other route awards. For example, it granted Delta a new route between Detroit and Miami via many intermediate points, granted Northwest Airlines, Inc. ("Northwest") a similar route between Chicago and Miami, and granted Capital Airlines, Inc. ("Capital") one between Buffalo and Miami (Order E-13024, R. 49-53).

Those awards also were put into effect on December 5, 1958 (Order E-13245, R. 95). In its Order E-13211 (R. 57 *et seq.*) issued just a few days previous, the Board denied the petitions which various parties had filed for a postponement pending reconsideration of those grants, just as in that same order it denied the petitions for stay of Delta's new authority in the ten markets here involved. In doing so, the Board in effect directed the carriers to implement the new Great Lakes-Florida authorities immediately. It said:

> ". . . We are of the opinion that these services should be put into operation at the advent of the peak winter season in order to give the traveling public the full advantage thereof. . . . This will afford the traveling public the advantages of the new services we have found required *immediately* during the 1958-1959 season" (Order E-13211, *supra*, dated November 28, 1958, at R. 59, emphasis added).

These new Florida routes constituted *extensive* certifications and consequently could be implemented—as they *were* implemented following the CAB's foregoing direction—only at great expense.

But if the Board's theory were right, on May 7, 1959 when it attempted to withdraw Delta's authority in the markets here involved, it also could have withdrawn *all* of the new Florida awards to Capital, Delta and Northwest, despite the huge sums which had been invested therein in conformance with the Board's earlier direction. Until that date, petitions were still pending before the Board for reconsideration and withdrawal of those authorities (see Order E-13211, at R. 79-80 and Order E-13835 at R. 81-82). The fact that the CAB then denied the petitions is no help. If the agency had the power to grant the petitions which sought imposition of the Delta restrictions here in question, it had equal power to withdraw all of the immense Florida certifications on the basis of which so much investment had been made.

It is clear that the exercise of any such power would be most arbitrary and not in keeping with basic principles of due process. Congress did not grant the Board any such power, and nothing in the statute or its history indicates that Congress intended to do so by implication as Petitioners now argue. But Congress did impose specific limitations upon the agency's power to modify effective certificates, limitations which protect the carriers and the public while leaving the CAB free to adopt reasonable procedures, which properly were applied by the Court below, and which will not unduly impede the administrative process.

CONCLUSION

In consideration of the foregoing, Delta Air Lines, Inc., respectfully prays that this Court will affirm the decision of the United States Court of Appeals for the Second Circuit in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 280 F. 2d 43 (2d Cir. 1960).

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APPENDIX A

Statutes and Regulations Involved

I: *Federal Aviation Act of 1958*, 72 Stat. 737 *et seq.*, 49 U.S.C. 1301 *et seq.*

A. *Section 401(f)*

EFFECTIVE DATE AND DURATION OF CERTIFICATE

"Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided,* That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service."

(72 Stat. 754, 49 U.S.C. 1371[f])

B. *Section 401(g)*

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

"The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such

certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

(72 Stat. 754, 49 U.S.C. 1371[g])

II. *Motor Carrier Act* (Part II of Interstate Commerce Act), 49 Stat. 543, as amended, 49 U.S.C. 301 *et seq.*

A. *Section 212(a)*

SUSPENSION, CHANGE, REVOCATION AND TRANSFER OF CERTIFICATES, PERMITS, AND LICENSES

"Certificates, permits and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of

this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit or license: . . ."

(49 Stat. 555, as amended, 49 U.S.C. 312[a]).

III. *Regulations of the Civil Aeronautics Board,* 14 C.F.R. 302.1 *et seq.*

A. *Rule 37*

"(a) *Time for Filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within twenty (20) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. Within ten (10) days after a petition for reconsideration, rehearing or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition. . . ."

(14 C.F.R. 302.37)